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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 27

AMERICAN FEDERATION OF LABOR, ET AL.,
Appellants,

v.

AMERICAN SASH & DOOR COMPANY, ET AL.,
Appellees

BRIEF FOR APPELLEES

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October, 1948.

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BRIEF FOR APPELLEES

Opinions Below

The opinion of the Supreme Court of Arizona (R. 111-133) is reported at 67 Ariz. 20, 189 Pac. (2) 912. The Superior Court of Maricopa County in dismissing the bill of complaint (R. 96) rendered no opinion.

Jurisdiction

The jurisdiction of this Court is invoked under Section 237(a) of the Judicial Code as amended, 28 U. S. C. A. 344(a). Probable jurisdiction was noted by order of this Court of March 29, 1948 (R. 143).

Statute Involved

This case presents an appeal from a final judgment of the Supreme Court of Arizona, upholding the validity of an

Amendment to the Constitution of the State of Arizona on the ground that it is not repugnant to the Constitution of the United States. This Amendment, commonly described as "Right-to-Work Amendment" reads as follows:

> "No person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization, nor shall the State or any subdivision thereof, or any corporation, individual or association of any kind enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of non-membership in a labor organization."

Corrected Statement of the Case

The statement of the case by appellants is generally adequate, but is inaccurate in its assertions that certain allegations of the complaint are, by the motion to dismiss "thus admitted for the purposes of this case" (Appellants' Brief, p. 9).

Appellees do not admit, but *deny*, that the ability to make union security contracts with employers is "indispensable" to the functioning of appellants and other labor organizations, and to the fulfillment of their purposes.

Appellees do not admit, but *deny*, that "the obtaining of union security agreements constitutes the only proven and effective means for working people to obtain and insure (1) their collective security and the maintenance of their labor unions once organization is achieved; (2) a security of bargaining power as a means of obtaining an adequate share of the joint production of capital and labor, and (3) the consolidation of gains achieved in collective bargaining and the protection of working standards through elimination of the cutthroat wage competition of non-union employees."

Appellees do not admit, but *deny*, that membership in plaintiff labor organizations is "open to all qualified per-

sons and such organizations freely admit qualified applicants into membership and impose no arbitrary or unreasonable requirements as a condition of membership, and that no labor organization in the State of Arizona including the appellants' labor organizations herein exercises or has any monopoly or control by agreement over the supply of labor in any trade, craft, occupation, or calling either in the State of Arizona, generally, or in any city or community within the State, including work involving the employment of millmen, cabinet makers and lumber handlers or other carpentry work."

The allegations that union security contracts are "indispensable" and that the obtaining of such contracts constitutes the "only" proven and effective means to accomplish certain union objectives, are *not allegations of fact* but conclusions which may or may not be drawn from the facts alleged by complainants. Furthermore, these conclusions are contradicted by other allegations of the complaint and are demonstrated to be unsound by factual material presented in the briefs of the appellant-complainants of which this Court is asked to take judicial notice (Appellants Brief, p. 28). Obviously, this Court cannot be asked to take judicial notice of the long and successful struggle of the labor unions to enlarge their memberships and to accomplish their purposes *which were accomplished* in many instances and to a great extent *without the aid of closed-shop contracts* and, at the same time, asked to accept the allegation that such contracts are "indispensable" or that they provide the "only" effective means of accomplishing union objectives.

Nor can this Court be asked to close its eyes to the history of the long and successful struggle of labor unions to have written into statutory law express prohibitions of the use of employer-coercion of employees to join or not to join labor organizations (the struggle against "yellow

dog contracts" and "company unions"), which history has been reviewed extensively in the opinions of this Court and many other courts. Nor will the Court ignore the fact that appellants devote the major part of their briefs to an attempt to convince the Court that union security contracts *are* "indispensable", thus recognizing themselves that these allegations of the complaint are allegations of debatable conclusions which are not admitted by a motion to dismiss.

The allegations that membership is open to all "qualified" persons and that labor organizations "freely admit qualified applicants" and impose "no arbitrary or unreasonable requirements" require an explanation as to who fixes the "qualifications" and what they are, or else the allegation is meaningless. If the qualifications were fixed by legal or scientific standards, the allegations would have one meaning. If they are fixed (which is a fact) by the unions themselves, then all the allegations mean is that the unions admit persons to membership whom they are willing to admit. The motion to dismiss may be regarded as conceding the truism that unions admit to membership those whom they are willing to admit, and that is all that is conceded.

The allegation that appellant labor organizations do not have or exercise "any monopoly or control" over the labor supply by reason of union security contracts is not only a conclusion but also is a conclusion which is disproved by other facts alleged in the complaint and by the closed-shop contract which is attached as an exhibit to the complaint, as will be demonstrated in the subsequent argument of this brief.

There is a minor inaccuracy in appellants' statement that the Supreme Court of Arizona construed the Right-to-Work Amendment as being effective or intended "to prevent employers from employing union members only" (Appel-

lants' Brief, p. 12). The Supreme Court of Arizona sustained the validity of the Amendment, which simply provides that "no person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization" and also that an agreement shall not be made "which excludes any person from employment or continuation of employment because of non-membership in a labor organization." On the face of this it is evident that an employer *now* employing only union members is *not* required to discharge any of them or to hire non-union employees. He may continue all his present employees and he may fill vacancies or add to the number of his employees by hiring additional union members. All he is forbidden to do is (1) to coerce persons now employed or seeking to be employed, into joining a union, by refusing to employ or to retain in his employ persons who are not members of a particular union and who do not wish to become members, or (2) to make an agreement that he will not employ or retain in his employ such persons.

Summary of Argument

I

The Right-to-Work Amendment was enacted in a reasonable exercise of the police power of the State.

II

The Right-to-Work Amendment does not violate the Fourteenth Amendment to the United States Constitution, or the First Amendment.

III

The Right-to-Work Amendment does not violate Article I, Section 10, of the United States Constitution.

ARGUMENT

I

The Right-to-Work Amendment is a reasonable exercise of an acknowledged police power.

It is conceded that the Right-to-Work Amendment was enacted in exercise of the police power of the State of Arizona, and the primary basis for appellants' contention that it violates the due process clause of the Fourteenth Amendment and that it impairs the obligations of contract must be found in the contention that the Amendment is so unreasonable and arbitrary that it must be held an invalid exercise of the police power.

The exercise of an unquestioned legislative power to limit rights of contract, and to regulate the conduct of persons or the conduct of a business, in order to protect the people against evils which menace their health, safety, morals or welfare, is limited only by the requirement that "the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end."

Home Building and Loan Association v. *Blaisdell*, 290 U. S. 398.

See also:

Nebbia v. *People of State of New York*, 291 U. S. 502;
West Hotel Co. v. *Parrish*, 300 U. S. 379.

The primary question, therefore, presented in an attack upon the constitutionality of the Right-to-Work Amendment is: What are the evils which the law was designed to remedy? Is the law a rational means to remedy these evils?

"We need not labor the point long settled that where legislative action is within the scope of the police power, fairly debatable questions as to its reasonableness, wisdom

and propriety are not for the determination of the Courts, but for that of the legislative body on which rests the duty and responsibility of decision." (*Standard Oil Company* v. *Marysville*, 279 U. S. 582.)

It is unnecessary to add a host of old and new citations to demonstrate that the foregoing quotation states an absolutely established rule of law.

Appellants may undertake to argue that there are no evils which flow from discrimination against persons because of non-membership in a labor organization, but such an argument is refuted by information conveyed in a long line of opinions of this Supreme Court and other courts, which are a matter of public record, and by a multitude of facts of which any court must take judicial knowledge. It is only necessary to summarize the evidence from these sources in order to demonstrate that there are evils flowing from the discrimination against persons because of non-membership in a labor organization, which so seriously affect the welfare of the people that legislation against such evils is clearly within the police power.

After a clear exposition of the evils to be remedied by the Right-to-Work Amendment the conclusion is inevitable that the Amendment is a reasonable exercise of the police power in prohibiting by law any discrimination in employment against persons because of non-membership in a labor organization, and prohibiting contracts which exclude persons from employment because of non-membership in a labor organization.

It has been said that a Constitutional Amendment carries with it no stronger presumption of validity than would attach to an ordinary statute, and that the fact that the people have enacted a law, or a Constitutional Amendment, by direct vote, does not increase the presumption as to its validity. But, it should be pointed out that when the Right-

to-Work Amendment was enacted by a direct vote of the people, and by a majority of 61,875 voting for the Amendment, and 49,567 voting against the Amendment (R. 28), it was made clearly evident that the people of Arizona believed that discrimination in employment against persons who were not members of labor organizations was an evil injurious to individuals and to the general welfare, and also believed that the prohibitions of the Right-to-Work Amendment were a reasonable method of limiting such an evil.

Furthermore, the argument that the Arizona law *and* similar laws in other States were not enacted "after deliberation", but as the result of "prejudices" is a baseless asse ion. When legislatures of State after State enact such laws against uniform vigorous opposition from labor unions, extensive deliberations are inevitable. In the case of Arizona the Constitutional Amendment was adopted by the voters themselves after—as required by State law—an official "Publicity Pamphlet", written by Proponents and Opponents, was printed for all the voters. In the ensuing campaign the measure was hotly debated in every conceivable forum throughout the State; and then it was approved by a decisive majority of all those voting in the general election of 1946. Public opinion was expressed after long deliberation in no uncertain terms.

It is a most important fact that legislation has been enacted in some seventeen States within recent years, directed at preventing the evils that flow from compulsory unionism, that is from compelling men to become members of labor organizations in order that they may be able to earn a living.

Similar Legislation in Other States

• • • The adoption of similar requirements by many states evidences a deep-seated conviction both as to the presence of the evil and as to means adopted to

check it. Legislative response to that conviction *cannot be regarded as arbitrary or capricious and that is all we have to decide*. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment." (Emphasis ours.)

West Coast Hotel v. *Parrish*, 300 U. S. at 399.

See also:

Jacobson v. *Massachusetts*, 197 U. S. 11.

In four states closed-shop agreements are now prohibited by a vote of the people amending the respective State Constitutions:

Arizona, amendment adopted election Nov. 1946.
Arkansas, amendment adopted election Dec. 1944.
Florida, amendment adopted election Nov. 1944.
Nebraska, amendment adopted election Nov. 1946.

In New Mexico the legislature has approved and referred to the people for their approval a proposal to amend the Constitution to prohibit closed-shop agreements.

In twelve States closed-shop agreements are prohibited by legislative enactment:

Delaware, H. B. 212, Laws, 1947.
Georgia, Act. No. 140, Laws, 1947.
Iowa, S. B. 109, Laws, 1947.
Louisiana, Dart's Gen. Stat. Sec. 43812.
Maryland, Ann. Code 1939, Art. 100, Sec. 65.
Nevada, C. L. 1929, Sec. 10473.
North Carolina, H. B. 229, Laws, 1947.
North Dakota, H. B. 151, Laws, 1947.
South Dakota, Ch. 80, Laws, 1945 (Con. Amend. 1947).
Tennessee, S. B. 367, Laws, 1947.
Texas, H. B. 27, Laws, 1947.
Virginia, Ch. 2; Laws, 1947.

Congress has prohibited closed-shop agreements with relation to railroad employees (45 U. S. C. A. 152 Sec. Fifth) and by trustees in bankruptcy with respect to enterprises for which he is trustee (11 U. S. C. A. 672).

Closed-shop agreements are contrary to the policy of the Norris-LaGuardia Act. (29 U. S. C. Sec. 102, 103).

Finally, the Taft-Hartley Act passed by Congress over the President's veto prohibits closed-shop agreements (Act of June 23, 1947).

It is now appropriate to review, first, those allegations of fact and admissions, in the bill of complaint which themselves demonstrate the monopolistic character of closed-shop or union shop contracts, which appellants seek to be free to enforce, and which are made illegal and unenforceable by the Right-to-Work Amendment.

We will review briefly those facts of common knowledge of which the court will take judicial notice, particularly the Federal Statutes and judicial decisions which furnish conclusive proof that contracts which aid labor organizations, either alone or in concert with employers, to monopolize opportunities to work, or to establish non-competitive wages and working conditions and, thereby, monopolistic controls of prices and production, are injurious to the general welfare.

It is *not* our contention that all restraints of trade and all regulations of price or production, which are incidental results of labor organization and collective bargaining, are injurious to the public. Labor unions and their normal activities serve, not only their members, but also, in prevailing opinion, serve to advance the general welfare. So do business organizations. But, when either labor leaders or business managers adopt practices and make agreements which aid in the exercise of monopolistic controls over commerce and which operate "to shift our society from a com-

petitive to a monopolistic economy", *both* labor unions and business corporations can be and should be restrained from such practices and from the making of such agreements. *Allen Bradley* v. *Local Union No. 3*, 325 U. S. 797, 810.

Pertinent Facts Proved or Admitted by the Complaint

Contrary to the contention of appellants, appellees do *not* concede the truth of the allegation of the bill of complaint (Paragraph 15, R. 17), that no labor organization in Arizona "exercises or has any monopoly or control by reason of any union-shop, closed-shop, or union security agreement over the supply of labor, in any trade, craft, occupation or calling." This allegation is not an allegation of fact, but a conclusion of mixed fact and law, which is not admitted by the motion to dismiss, and which is, in fact, contradicted and shown to be false by other allegations of the complaint.

Likewise, the allegation in Paragraph 14 of the complaint, that membership in all labor organizations in Arizona is open to all qualified persons, and that such organizations freely admit qualified applicants, and "impose no arbitrary or unreasonable requirements as a condition to membership"—is also a conclusion of mixed fact and law, which is contradicted and shown to be false by other allegations of the complaint.

In contradiction to the foregoing conclusions advanced by appellants are, for example, the following:

a) The allegations of Paragraph 12 of the complaint (R 13) show that duties and obligations of union members are fixed in the laws of the union and require unionists to refuse to work with non-unionists under penalty of forfeiting their membership if they do so. Also, a union law is quoted to the effect that the union label can only be used by shops and mills having an eight hour day and employing only members of the union

(except on special dispensation granted by a union officer, no such dispensation, it is admitted, having been granted in Arizona).

b) Under the allegations of Paragraph 25 (R. 23) reference is made to the collective bargaining agreement particularly involved in this complaint, which is incorporated by reference to the attached Exhibit 2. The attached Exhibit 2 (R. 57) contains the collective bargaining agreement of November 4, 1946. Section II reads as follows: "The Company agrees to recognize and deal with the Union as the sole collective bargaining agent for all of their planing mill employees in their operations at Phoenix, Arizona, except office workers, shipping clerks, and superintendents, and the Company agrees to continue such recognition during the life of this agreement."

Section III provides as follows: "The Company agrees to have in their employ only members in good standing of the Union, subject, however, to the following terms and conditions."

The first condition is that the Company has a right to determine the competency of all persons to be hired, but it is also provided that the Company has a right to hire a non-union man only "if the Union is unable to furnish a person satisfactory to the Company;" then, it is provided, if a non-union man is hired and survives a probationary period of fifteen (15) days, he shall become a member of the Union.

The second condition in this Section is "Employers agree that any employee who fails to maintain membership in the Union as provided in Section I above shall be discharged upon proper notice given by the Union".

From the foregoing facts, alleged by appellants, it is evident that, contrary to the allegations of the bill of complaint, labor unions which obtain such a collective bargaining agreement seek and obtain, and do "have and exercise" a complete monopoly or control over the supply of labor,

extending from individual employers to an entire industry. Such unions are the sole source from which an employer can obtain a new employee, unless the Union is unable to furnish some one satisfactory to the Company. This means that the Company would be practically compelled to accept any employee tendered by the Union, unless he were obviously incompetent or otherwise seriously objectionable. But, even the feeble possibility that the Company may employ a non-union man is not permitted to relax the union-control over the supply of labor which the Union insists upon. The employer is required to agree that the would-be non-union employee, if acceptable to the Company after fifteen (15) days probation, "shall become a member of the Union." Furthermore, the employer agrees that unless an employee maintains his membership in the Union, he shall be discharged upon request by the Union. This means, in simple language: First, no one can obtain a job without being or becoming a member of the Union. Second, every employee must submit to all the duties and obligations imposed on him by the Union's private laws, or else his membership may be forfeited and thereupon the employer must discharge him at the request of the Union. It is impossible to conceive of any more complete or effective union-control over the supply of labor than that proved by the allegations of the bill of complaint.

Just translate such an agreement into the field of business. Assume that a trade association of buyers attempted to make an agreement with all manufacturers of a certain product, that the manufacturer could only sell to members of the association, or if there were no satisfactory retailer offered to the manufacturer and he chose an independent retailer, that independent must join the association, maintain membership and accept its discipline, or otherwise be stricken from the manufacturer's list of dealers.

Then, make the further assumption that the trade association negotiated a uniform profit for dealers in the form of a uniform discount from the manufacturer's list price, which must be allowed to all dealers. Would there be the slightest question but that such an agreement was a clear combination, agreement and conspiracy in restraint of trade in violation of the anti-trust laws? That is precisely what is accomplished by the closed-shop or union-shop agreements, which the appellant labor unions force upon employers.

If it were not for the special exemption of labor organizations from prosecution under the anti-trust laws, there is no question, in light of the uniform judicial decisions, that all such operations as appellants allege they carry on with the aid of closed-shop or union-shop agreements, would be held in violation of the anti-trust laws, and all such agreements held to be illegal as creating or tending to create an unlawful monopoly and to impose unlawful restraints of trade. (See quotations from judicial opinions *infra*, p. 16, 26.)

Facts of Judicial Knowledge

Facts universally known, of which the Court has judicial knowledge, federal and state statutes and judicial opinions, could be presented in voluminous quantity to show the inevitable and conceded monopolistic effects of closed-shop or union-shop agreements. The notorious exemption of unions from anti-monopoly laws is in itself complete evidence that all union practices, such as efforts to standardize wages and hours, and even by voluntary methods to control the supply of labor, are monopolistic in intention and in effect. But, it has been the prevailing theory throughout the United States that the potential evils involved in permitting any group or class of persons to make monopolistic agreements were outweighed by the benefits which would be conferred upon wage earners, and the advancement of the

general welfare, by the betterment of labor conditions through exempting labor organizations from conformity with anti-monopoly laws applicable to the managers of industry, the employers of labor.

However, the theory behind this exemption of labor unions was that they were *free* associations of workers striving to benefit and to advance themselves without, at the same time, doing injury to the general welfare. One of the major declarations of the rights of organized labor in Section 2 of the Norris-LaGuardia Anti-injunction Act (29 U. S. C. A. 102, 103) declares the public policy of the United States in regard to the individual worker to be that "*although he should be free to decline to associate with his fellows,* it is necessary that he have full freedom of association, self-organization and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment". But, under closed-shop or union-shop agreements, a man who wants to work at his trade is not "free to decline to associate with his fellows". He must join the union and submit to its private laws or he will be denied an opportunity to earn a living.

Under the foregoing public policy, the worker is supposed to have "full freedom of association, self-organization and designation of representatives of his own choosing". But under closed-shop and union-shop agreements, if he wants to associate with one labor organization when another labor organization has the contract, he can't exercise his freedom of association or designate representatives of his own choosing; he must join the union that happens to have the contract. Perhaps 48% of the employees of a craft don't want to be members of the union holding the contract, but they have to remain members and accept the discipline imposed by 52%. Perhaps all the members of an AF of L craft want to associate together and designate their repre-

sentatives; but if a CIO industrial union holds the contract, these skilled craftsmen must accept the terms of their employment laid down for them by an organization dominated perhaps by lower skilled workmen whose fundamental desire is not to raise the wages of the higher paid, but to raise the wages of the lower paid, regardless of the relative value of their contributions. These are obvious examples of the falsity of any contention that a closed-shop or a union-shop agreement is not monopolistic, and the falsity of the claim that appellant unions do not exercise any monopoly-control over the supply of labor in Arizona. For further examples of the notoriously monopolistic character of closed-shop agreements, we refer to the following quotations from judicial opinions:

In the majority opinion, by Mr. Justice Black, in *Allen Bradley Co. et al. v. Local Union No. 3, International Brotherhood of Electrical Workers, et al.*, 325 U. S. 797, it is written:

> "It is true that many labor union activities do substantially interrupt the course of trade and that these activities, lifted out of the prohibitions of the Sherman Act, include substantially all, if not all, of the normal peaceful activities of labor unions. It is also true that the Sherman Act 'draws no distinction between the restraints effected by violence and those achieved by peaceful . . . means,' *Apex Hosiery Co.* v. *Leader*, supra, 513, and that a union's exemption from the Sherman Act is not to be determined by a judicial 'judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.' *United States* v. *Hutcheson*, supra, 232. Thus, these congressionally permitted union activities may restrain trade in and of themselves. There is no denying the fact that many of them do so, both directly and indirectly." (pp. 810-811).

* * * * * * *

"Seldom, if ever, has it been claimed before, that by permitting labor unions to carry on their own activities, Congress intended completely to abdicate its constitutional power to regulate interstate commerce and to empower interested business groups to shift our society from a competitive to a monopolistic economy." (p. 810)

The opinion acknowledges the inconsistency in a law which provides that labor unions alone can destroy competition but not in combination with business groups and comments:

"This, it is argued, brings about a wholly undesirable result—one which leaves labor unions free to engage in conduct which restrains trade. But the desirability of such an exemption of labor unions is a question for the determination of Congress." (p. 810)

The dissenting opinion by Mr. Justice Roberts indicates general agreement in the court as to the evils that flow from tolerating a monopoly of labor power (in the maintenance of which the closed-shop is a potent instrument). He writes as follows:

"Unless I misread the opinion, the union is at liberty to impose every term and condition as shown by the record in this case and to enforce those conditions and procure an agreement from each employer to such conditions by calling strikes, by lockout, and boycoft, provided only such employer agrees for himself alone and not in concert with any other.

* * * * * * *

"The course of decision in this Court has now created a situation in which, by concerted action, unions may set up a wall around a municipality of millions of inhabitants against importation of any goods if the union is careful to make separate contracts with each employer, and if the union and employers are able to convince the Court that, while all employers have such agreements, each acted independently in making them,

—this notwithstanding the avowed purpose to exclude goods not made in that city by the members of the union; notwithstanding the fact that the purpose and inevitable result is the stifling of competition in interstate trade and the creation of a monopoly."

In *Apex Hosiery Co.* v. *Leader et al*, 310 U. S. 469, the majority opinion by Mr. Justice Stone included the following statement:

"Furthermore, successful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, see *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 209, an elimination of price competition based on differences in labor standards is the objective of any national labor organization." (p. 502)

In this case the dissenting opinion by Mr. Chief Justice Hughes included the following comment which is extremely pertinent to the present issue regarding the Arizona Amendment:

"When the Union demanded a closed-shop agreement and, on its refusal, declared the strike, only eight of the Company's twenty-five hundred employees were members of the Union. The Company's plant was seized and held for several weeks. Its machinery and equipment were 'wantonly demolished or damaged to the extent of many thousands of dollars.'

"There was not merely a stoppage of production, but there was also a deliberate prevention of the shipment of finished goods to customers outside the State."

In *United States* v. *Hutcheson, et al.*, 312 U. S. 219, the majority opinion by Mr. Justice Frankfurter sustained a

demurrer to an indictment charging a conspiracy in violation of the Sherman Act, on the simple ground of immunity conferred on labor unions by Acts of Congress, stating:

> "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 (Clayton Act) are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means."

There appeared to be no question in the *Hutcheson* case that there was a conspiracy in restraint of trade adequately charged. This is quite pertinent to the present issue, because the carpenters union, one of the present appellants, was the alleged conspirator. The strike and boycott in the *Hutcheson* case was to prevent interference by the machinists union with the carpenters union in its monopoly control of jobs. Yet, this is the same union which, in its present complaint solemnly asserts that it has no "monopoly or control" over the supply of labor in Arizona (R. 17), although the union also asserts that its Constitution forbids a member to work with a non-member! (R. 14, 15).

There should be also a limited discussion here of the broad self-serving conclusions incorporated in Paragraph 14 of the complaint to the effect that union membership is open "to all qualified persons" and that the unions freely admit "qualified applicants" and that they "impose no arbitrary or unreasonable requirements as a condition to membership." The definition of who is a "qualified person" and who is a "qualified applicant" is to be found only in the union laws. Assume, as is common, that an apprentice training is required to qualify a worker for a particular job. Assume further, as is common, that limitations upon the number of

apprentices are fixed by union laws. (As an extreme example, reference should be made to the common practice of various unions which give first preference in apprenticeship, and thereby commonly limit apprenticeship, to relatives of their members.) Under these circumstances, who can become a "qualified" applicant, except one whom the union permits to become "qualified"? Therefore, the allegation might just as well read that the unions freely admit those whom they want to admit. It would be difficult, if not impossible, for an employer to claim that an employee was "competent," if under the Union standards he was not "qualified."

For a comprehensive review of the extraordinary "qualifications" which are a prerequisite for membership in many labor unions we refer to an article entitled "The Right to Join a Union" by Clyde W. Summers, 47 Columbia Law Review, Page 33-74.

It is pertinent to note from this article that thirty-two unions with a total membership of 2,500,000 exclude Negroes either by constitutional provision or established practice. This membership is about one-fifth of organized labor. "Twenty-nine unions have some form of citizenship bar." Thirty unions exclude persons because of political beliefs, particularly communists. Eight unions "have constitutional provisions excluding women, but it is generally believed that exclusion of women is more widespread than this number would indicate."

"Probably the most important form of exclusion is the closed union, but it is impossible to determine precisely to what extent this practice exists."

"Denial of the right to join does not always reveal itself in express form, but may be achieved by more subtle devices. A few unions set their initiation fees so high as to effect complete exclusion. Twenty-one unions require an ap-

prenticeship as condition of membership and some of these limit the number of apprentices. Twenty unions require the applicant to pass a competency test, thus enabling the examining committee to exclude any or all of the applicants. All of these devices can be used to effect a closed union, but the apprenticeship and competency requirements are often used to exclude unwanted groups, especially Negroes."

"As has been indicated, the closed union has its greatest strength in the building trades. It is this same type of union which has high initiation fees, apprenticeship requirements and competency tests. Exclusionary practices are concentrated in a relatively small number of trades, but these trades include some of the most powerful unions which control many of the higher paying and more desirable lines of endeavor. It is because of this pattern that the denial of the right to join creates such a serious problem."

Moreover, as heretofore shown, the employer, under the closed-shop contract here involved (R. 60), has no right to hire a non-union man unless the union cannot furnish an employee, and then, if a non-union man is hired, he must become a member of the union. But, it is alleged that the unions "impose no arbitrary or unreasonable requirements as a condition to membership." This is a mere conclusion which has only very limited relevance. In the first place, when the lawmakers decide that a labor union contract is monopolistic because anyone who wants to work must join the union and submit to its private laws, its wage fixing, its price fixing, and its strikes to restrain trade in order to gain private advantage, the lawmakers are little concerned with whether membership is conditioned on reasonable or unreasonable requirements.

If all the businessmen producing one product combined in an association to monopolize control of production and price, it would be of little importance as to whether their

requirements of membership were reasonable or unreasonable. In fact, they would probably make them unreasonable in order to prevent competition. So here, the wrongful character of closed-shop agreements is not made less wrongful if union requirements for admission to membership are reasonable. The intended pertinence of this allegation is, an attempt to show that no one is denied a right to work because he can join a union on reasonable terms. But, here again, the allegation, if true, would be irrelevant. The decisive question is not whether *admission* requirements are arbitrary or unreasonable. The question is: Should a man be denied the right to work unless he submits to the absolute control of a private organization over the terms and conditions of his employment, and even as to whether he shall remain employed, or whether he shall go on strike and remain unemployed in order to carry out some union policy over which he has no individual control.

Appellants quote the famous judicial opinion that "A single employee was helpless in dealing with an employer * * * Union was essential to give laborers opportunity to deal on equality with their employer." (*American Steel Foundries* v. *Tri-City Council, supra*). But, in this day of vast labor unions, unions are almost always composed of more men than are employed by any single employer, and the larger unions include vastly more men than the working force of any employer. As a result a single employee is frequently more helpless in dealing with his union than he is in dealing with his employer. The employer at least always has an interest in maintaining a satisfied cooperative force of employees. The union is often more interested in some large policy than in the welfare of a particular group of workers who may have no quarrel with their employer and yet may be called upon to stop their employment.

It is also obvious that a single employer has now become often as "helpless" in dealing with a powerful union as a single employee used to be in dealing with an employer. Hence, freedom of an employer from coercion to sign a closed-shop contract has become a subject of public concern and a proper subject of legislative action.

Many employers were once inclined to use coercion, and to oppress their employees by forcing inadequate wages and excessive hours of work. Perhaps there are many employers today who would revert to such practices if it were not for the resisting strength of organized labor, backed up by an enlightened public opinion. But, it is also notorious today that large labor organizations are so organized and operated that the ruling officialdom exerts a coercive control over the membership, which individuals and even large groups of workers are helpless to resist. This does not mean that labor organizations should be suppressed or crippled because they are sometimes ruled by tyrannical or self-serving labor bosses or even by criminal racketeers. But, when any organization upon which a man's ability to earn a livelihood depends, becomes so large and subject to such remote and arbitrary controls that the voices and interests of individuals have little influence, there should be, *in any democratic society*, a recognition of the right of the individual to cease to belong to such an organization, and to pay its dues and to be subject to its discipline. It is true that in a *political* society a majority must rule and that a citizen must pay taxes and accept the discipline of public laws; but it is wholly false logic to give to a private labor organization the same standing as a public government in its right to rule its subject members.

Our constitutional government, in order to protect individual liberty, creates individual rights which even the

government may not violate, and imposes limitations upon the lawmaking power of the temporary rulers of federal, state, and municipal governments. But, there are no such public responsibilities, no such constitutional limitations of power upon a private labor organization. Yet, such an organization has a power to tax its members and to discipline them in the earning of a livelihood far beyond any power which citizens have conferred upon any government in the United States. This is not an argument against labor organization, but it is an argument to demonstrate that the exercise of a monopoly control over the supply of labor, and the denial of a right to employment to any except members of a labor union, is the exercise of a private, irresponsible authority, which is destructive of individual liberty and detrimental to the public welfare. The political government, representing all the people and required by the Constitution to preserve the individual liberties of the people, has a right, and indeed a duty, to restrict and prevent monopolistic controls over commerce by any organization; and, above all things, certainly a duty to prevent monopolistic controls of opportunities to earn a living—opportunities which are essential to any real enjoyment of life, liberty, or property.

Labor organizations, like all organizations of citizens, are permitted to function only so long and to the extent that such associations advance the interests of their members without undue injury to, or interference with, the liberties of other citizens. The entire complaint of the appellants demonstrates, not only a capacity to use organized activity to injure others, but a deliberate purpose to injure anyone who will not conform to the private laws of a private organization, to injure him in the most vicious way possible by denying him the opportunity to earn a livelihood. Protestations of beneficent purposes for the advancement of the interests of labor unionists are no answer to the claim

that it is a reasonable exercise of governmental power to forbid the making and prevent the enforcement of monopolistic agreements, which make the general welfare subject to injury or advancement according to the intelligence or good will of a private organization.

The Amendment Is Anti-monopoly Legislation

The primary and obvious purpose of the Amendment is to prevent the use by employers and labor unions of agreements and practices which are essentially monopolistic. Every monopolistic control depends on some means of eliminating competition. To preserve competition in prices, in costs, in quality or quantity of production, is the objective of anti-monopoly legislation. Any device to control or regulate the supply of goods or services for private profit is an instrument of private monopoly subject to prohibition, regulation or toleration in accordance with a legislative judgment which, having a rational basis, is not subject to judicial reversal.

It would be fantastic sophistry to claim that a closed-shop or union-shop agreement is not a potent aid to labor unions and to employers, for separate or joint benefit, in obtaining and exercising monopolistic controls over prices, wages and production. Such agreements may also have other purposes and aid in accomplishing desirable results. The same claim might be made regarding business agreements to eliminate "destructive competition", or to "stabilize" markets, or to establish healthful and reliable standards of production for the benefit of workers and consumers.

But, the courts have sternly set aside all such excuses or justifications for monopolistic practices and universally upheld the power and propriety of legislative prohibitions of contracts and practices which *might* be (even if claimed *not* to be) instrumentalities of monopolistic controls.

The prohibition of monopolies has long been recognized and sustained as a proper field of legislative action in the exercise of the police power of the states:

International Harvester Co. v. *Missouri*, 234 U. S. 199;
Grenada Lumber Co. v. *Mississippi*, 217 U. S. 433;
Liberty Warehouse Co. v. *Burley Tobacco, etc., Co.*, 276 U. S. 71.

And this includes legislation restraining unions and their activities:

Lower v. *Lawlor*, 208 U. S. 274;
Gompers v. *Buck's Stove, etc., Co.*, 221 U. S. 418;
Lawlor v. *Loewe*, 235 U. S. 522;
Duplex Printing P. Co. v. *Deering*, 254 U. S. 443;
Coronado Coat Co. v. *United Mine Workers*, 268 U. S. 295;
United States v. *Brims*, 272 U. S. 549;
Bedford Cut Stone Co. v. *Journeymen S.C.A.*, 274 U. S. 37;
Local 167, etc., v. *United States*, 291 U. S. 293;
Apex Hosiery Co. v. *Leader*, 310 U. S. 469.

"The reasons for this conclusion are as evident as they are conclusive. 'There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor.' • • • 'The common law has long recognized, as part of the boasted liberty of citizens, the right of every man to freely engage in such lawful business or occupation as he himself may choose, free from hindrance or obstruction by his fellowmen, saving such as may result from the exercise of equal or superior rights on their part.'

"It needs no argument to demonstrate that any combination between employers and employed, which creates a condition in a community such as has been hereinbefore described, is a serious menace to the

craftsman or workingman who, in the exercise of his free right of choice, does not wish to join a union. It is calculated to place upon his freedom of choice and action a coercion which leaves him no longer wholly free. Its tendency is to expose him to the tyranny of the will of others, and to bring about a monopoly which will exclude what he has to dispose of and other people need from the open market, or perhaps from any market.

"Monopolies of things of common use and need, whether created by governmental grant or by the acts of private persons or corporations, are odious, and their existence is contrary to public policy. They were condemned by the common law of England, and, although changing in their more common source, have remained under a like condemnation in that country and this to this day. They are especially intolerable where they concern the basic resource of individual existence, to-wit, the capacity to labor. The whole theory of a free government is opposed to them. *Norwich Gas Light Co.* v. *Norwich City Gas Co.*, 25 Conn. 19, 38. Their beneficiaries may enjoy the favors they bestow, and feel injured when deprived of them. But the interest of the public outweighs that of individuals, and the public at large can see nothing but danger in the monopoly of anything of which there is a common need, or which is a common resource of life. This is an old and familiar doctrine in whose maintenance none have as deep a concern as the poor, the humble, and those who live by the labor of their hands. The monopoly need not be complete to come under the ban of the law. * * *"

Connors v. *Connolly* (Conn.), 86 Atl. 600, 604.

And see:

Lehigh Structural S. Co. v. *Atlantic, S. & R. Co.*, (N.J.), 111 Atl. 376, 378;

Curran v. *Galen* (N. Y.), 46 N.E. 297;

Berry v. *Donovan* (Mass.), 74 N.E. 603.

Polk v. *Cleveland R. Co.* (Ohio), 151 N.E. 808;
Slaughter House Cases, 83 U. S. (16 Wall.) 36, 104;
Campbell v. *Motion Pict. Mach. Operators' Union* (Minn.), 186 N.W. 781.

In *United States* v. *Brims*, 272 U. S. 549, the Court held a violation of the anti-trust law an agreement entered into by the carpenters union, builders, contractors and lumber mills in Chicago whereby the carpenters agreed not to install millwork made by non-union labor, and the apparent purpose of which was to eliminate competition from out of state millwork. A similar case was *Local 167* v. *United States*, 291 U. S. 293.

It is true that since the enactment of the Clayton Act and the Norris-LaGuardia Act the Court, *by reason of these Acts*, has narrowed the application of the Sherman Anti-Trust Act as applied to union activities. The enactment of the Clayton Act and the Norris-LaGuardia Act *was necessary* in order to exempt reasonable union activities from the application of the Sherman Anti-Trust Act; and the Supreme Court in applying the Clayton Act and the Norris-LaGuardia Act has recognized restraint of labor activities tending toward monopoly as a proper field of legislation under the police power and has exempted such activities only because of these two acts.

> "The public policy with respect to free competition has engendered state and federal statutes prohibiting monopolies, which have been upheld" (p. 529).
>
> . . . "'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce *is an economic question which this court need not consider or determine.*' *Northern Securities Co.* v. *United States*, 193 U. S. 197, 337, 338, 24 S. Ct. 436, 457, 48 L. Ed. 679. And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbi-

trary or discriminatory *it does not lie with the courts to determine that the rule is unwise* • • • (p. 537).

"The lawmaking bodies have in the past endeavored to promote free competition by laws aimed *at trusts and monopolies*. The consequent interference with private property and freedom of contract *has not availed with the courts* to set those enactments aside as denying due process • • •" (p. 538).

Nebbia v. *New York*, *supra* (pp. 529, 537, 538).

That the monopoly has not yet been achieved does not prevent state action to prohibit it.

"The monopoly used need not be complete to come under the ban of the law."

Connors v. *Connolly*, *supra*.

"It is sufficient if the agreement tends to that end and to deprive the public of the advantages which flow from free competition."

United States v. *Knight Co.*, 156 U. S. 1.

"The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. . . . Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints."

U. S. v. *Trenton Potteries Co.*, 273 U. S. 392, 397.

"• • • Combinations are no less unlawful because they have not as yet resulted in restraint. • • •"

Assoc. Press v. *United States*, 326 U. S. 1, 14.

It cannot be reasonably argued that the creation and exercise of monopolistic controls by labor unions are *constitutionally* exempt from legislative restraints which admittedly can be imposed on business organizations. Unions and corporations are alike associations of human beings

for cooperative advancement of their interests. They have equal rights under the constitution and equal obligations to conform to public policies defined and written into law by legislative authority.

> "The objective of labor monopoly, like business monopoly, is to benefit the monopoly group at the expense of other groups and of the community at large. The method of labor monopoly, like business monopoly, is to acquire control over the supply of an essential service and to raise its price above the competitive level by restricting its supply."
>
> *Martin* v. *Jones*, "Renovated Capitalism," supplement to The Journal of Business of The University of Chicago. Vol. XV, No. 4.

The *policy* of a state or federal government to foster or to discourage certain activities of unions or corporations, because they promote or injure the public welfare, is subject to change as conditions change.

> "Whether a law enacted in the exercise of the police power is justly subject to the charge of being unreasonable or arbitrary can ordinarily be determined only by a consideration of the contemporary conditions, social, industrial, and political, of the community to be affected thereby. Resort to such facts is necessary, among other things, in order to appreciate the evils sought to be remedied and the possible effects of the remedy proposed."
>
> Mr. Justice Brandeis, dissenting, in *Truax* v. *Corrigan*, 257 U. S. 312, 354.

There was a time when prevailing opinion induced state and national governments to grant labor unions a sweeping immunity from the restraints of anti-monopoly laws. But in recent years widespread and notorious abuses of monopolistic powers by labor unions have brought a change in public opinion which has been reflected in state and national legislation.

It has been made plain that labor managers, like business managers, may be so selfish, short-sighted, reckless or positively criminal in their purposes and methods that they cannot be permitted to use their economic powers, or to make agreements, in such complete freedom that the public welfare may be seriously injured. Nation wide strikes, depriving the public of essential goods and services, even in time of war, have created a nation wide demand that "something be done" to curb such a private power to bring hardship, suffering and peril to an entire population.

Many strikes in recent years, stopping the production of coal, or transportation or communication, which are matters of common knowledge, have caused a host of legislative proposals to subject labor unions to the restraints of the anti-trust laws, to outlaw industry-wide bargaining and to make illegal closed shop contracts. This developing public opinion has focused upon an obvious source of the monopolistic power of labor organizations that has been so plainly abused, that is, upon the absolute control of the labor supply through closed-shop, union shop, or union security contracts which make it possible for a national labor union to stop the production of food and services in an entire industry.

There may be indefinite argument over what legislation may be most effective and fairest to all concerned as a remedy for these evils. But there can be no serious question that legislation to make unlawful the making or enforcement of any contract which creates or tends to create a labor monopoly, is a reasonable effort to remedy these evils. The adoption of such legislation in the large number of states heretofore listed (p. 9, *supra*) is conclusive evidence of the reasonableness of the Arizona Amendment.

> "The adoption of similar requirements by many states evidences a deepseated conviction both as to the

presence of the evil and as to the means adopted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious and that is all we have to decide."

West Coast Hotel v. *Parrish*, 300 U. S. at 399.

II

The Right-to-Work Amendment is not violative of the Fourteenth Amendment.

When once it is made clear that there are evils to be remedied, for which the Right-to-Work Amendment provides a reasonable remedy, then any complaint that the Arizona Amendment is violative of the Fourteenth Amendment becomes untenable. The law is so well settled, that restraints may be imposed upon liberty of contract and restraints on personal freedom of action, in order to protect persons and the public generally from injuries, that it would be a waste of time to cite the repeated reassertions of this legal doctrine. It should be sufficient to point to the applicability to the present case of the quotations which follow from leading cases.

"The objection that the law is unconstitutional as unduly abridging the freedom of contract in prescribing the particular method of compensation to be paid by employers to miners for the production of coal was made in the case of *McLean v. Arkansas*, 211 U. S. 539, in which this court sustained a law of the State of Arkansas requiring coal mined to be paid for according to the run of mine system according to its weight when brought out of the mine in cars. In that case the constitutional objections founded upon the right of contract which are made here were considered and disposed of. This court has so often affirmed the right of the State in the exercise of its police power to place reasonable restraints like that here involved, upon the freedom of contract that we need only refer to some of the

cases in passing. *Schmidinger v. Chicago*, 226 U. S. 578; *Chicago &c. R. R. v. McGuire*, 219 U. S. 549, and cases therein cited and reviewed."

Rail and River Coal Company v. *Yaple, et al., Constituting the Industrial Commission of Ohio*, 236 U. S. 338, 349.

"Not only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end has the result of modifying or abrogating contracts already in effect.' *Stephenson v. Binford*, 287 U. S. 251, 276. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while,—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court."

Home Building & Loan Association v. *Blaisdell, et al.*, 290 U. S. 398, 434, 435, 437, 438, 442, 443.

"In *Home Building & Loan Association v. Blaisdell* this Court considered the authority retained by the State over contracts 'to safeguard the vital interests of its people.' The rule that all contracts are made subject to this paramount authority was there reiterated. Such authority is not limited to health, morals and safety. It extends to economic needs as well. Utility rate contracts give way to this power, as do contractual arrangements between landlords and tenants."

Veix v. *Sixth Ward Building & Loan Association of Newark*, 310 U. S. 32, 38, 39.

"* * * The *Blaisdell* case and decisions rendered since (e.g., *Honeyman v. Jacobs*, 306 U. S. 539; *Veix v. Sixth Ward Assn.*, 310 U. S. 32; *Gelfert v. National City Bank*, 313 U. S. 221; *Faitoute Co. v. Asbury Park*, 316 U. S. 502), yield this governing constitutional principle; when a widely diffused public interest has become enmeshed in a network of multitudinous private arrangements, the authority of the State 'to safeguard the vital interests of its people,' 290 U. S. at 434; is not to be gainsaid by abstracting one such arrangement from its public context and treating it as though it were an isolated private contract constitutionally immune from impairment."

East New York Savings Bank v. *Hahn et ux.*, 326 U. S. 230, 232.

In addition to the foregoing, particular attention should be called to the fact that this Court has repeatedly sustained laws which prohibit discriminations in employment because of membership in a labor organization.

Texas & N. O. R. Co. v. *Brotherhood of R. & S. Clerks*, 281 U. S. 548;

Virginian R. Co. v. *System Federation R. E. D.*, 300 U. S. 515;

N. L. R. B. v. *Jones & Laughlin S. Corp.*, 301 U. S. 1.

It was once, and not unreasonably, contended that an employer should be free to discriminate against employees, or would-be employees, belonging to certain labor organizations, whenever he felt that membership in such organizations made them undesirable employees (*Coppage* v. *Kansas*, 236 U. S. 1). But, it was held ultimately by this Court that, in the protection of the public interest, an employer could be prohibited from making contracts discriminating against labor unions, and could be prohibited from discriminating against them in the selection and treatment of employees.

The Right-to-Work Amendment presents the converse proposition: that an employer can be prohibited from discriminating against a worker because he is *not* a unionist. This is far more obviously in the public interest, and more obviously the remedy of an existing evil, than the anti-discriminatory legislation previously approved as valid by this Court. Here, the purpose of the law is to prevent contracts, and conduct by employers which have the effect, in the first place, of requiring a man to become a member of, to support and submit to the discipline of, a private organization in order to be able to earn a living; and, second, of providing employers and employees with a convenient and useful instrument for imposing monopolistic controls upon the industries and trades of the States and of the Nation.

III

Right-to-Work Amendment does not impair the obligation of contracts.

In the first place, existing contracts can be made illegal by a proper exercise of the police power. In the second place, the Right-to-Work Amendment only *directly* prohibits the entering into in the future of certain agreements. This could not impair the obligation of an existing contract. It is true, however, that the first clause of the Amendment does have the *indirect* effect of making an existing closed-shop contract enforceable. But, again, the rule of law is well established that all contractual obligations must be held subject to limitation or destruction by a reasonable exercise of the police power. It is certainly sufficient to point out the complete abrogation of contracts by legislation limiting or prohibiting the production or consumption of alcoholic liquor; such laws being universally sustained.

The cases heretofore cited to show that the Arizona Amendment is not violative of the Fourteenth Amendment

(p. 32, *supra*) furnish ample answer to the contention that the Amendment is violative of Section 10, of Article I, which forbids the impairment of contracts.

DETAILED REPLY TO APPELLANTS' BRIEF

The entire brief for appellants is based on a series of propositions, not one of which is true in fact or in law. These propositions are:

1. That the constitutional right of "freedom to assemble" *produces a right* to make contracts which are "indispensable" to accomplish the purposes of assembling.

> "These specific types of contracts are *products* of the right to freedom of assembly which is specifically guaranteed by the Constitution and *may not be abridged.*" (Appellants Brief p. 77)

2. That contracts to exclude non-union workers from employment are "indispensable" to accomplish the purposes of workers who "assemble" as a trade union.

> "In the cases at bar the right to form and maintain a union is necessarily in issue when an *indispensable* element of that right-union membership as a condition of employment—is proscribed. (Appellants' Brief p. 32)

3. That a monopoly of the labor supply is "indispensable" to accomplish the purposes of a trade union "assembly".

> "Workers cannot thrive but can only die under competition between themselves . . . Thus the exercise by workingman of freedom of assembly, to have real meaning, *must comprehend the right* to eliminate wage competition between individual employees and to require adherence to the common rule through the device of union membership as a condition of employment, whereas in the case of business men it will not include

the right to eliminate price competition." (Appellants' Brief p. 43)

4. That all workers "in a mine, mill or shop, or in a craft or calling" are members of a "society" which is "governed" by a union, which all workers must join, and to whose "government" all must submit, if they wish to work.

> "The worker becomes a member of an economic society when he takes employment . . . It is the society of his fellow workers in a mine, mill or shop, or in a craft or calling. The union is the organization or *government* of this society formed by the exercise of the right of association. It is *essential* to the nature of this organization that it include every individual who is a member of the society which it governs". (Appellants' Brief p. 47)
>
> "The common rule of collective bargaining carries with it the legal doctrine that *the union is the* common authority or *government of a society of workers.* It has in a sense the *powers* and *responsibilities* of a *government.*" (Appellants' Brief p. 57)
>
> "We can summarize the nature of union membership as a common condition of employment in an industrial society by again comparing it to citizenship in a political society. *Both are compulsory upon individuals.*" (Appellants' Brief p. 58)

5. That the liberties of the *individual* worker, which are guaranteed under the Constitution of the United States, are inferior to, and subject to the *collective* "constitutional right" of a labor union to govern him.

> "The liberty of the individual is not the right to license, but participation in a social organization founded upon equality, justice and law. *The union is that organization for employees.* It is the product of the exercise of their *right of assembly*, and it is *essential* to the exercise of their *right* to secure equality of bargaining power with employers, that membership in the union be a common condition for all who are in fact

members of the group *governed by the union.*" (Appellants' Brief p. 59)

The foregoing quotations from Appellants' Brief set up doctrines which are (1) utterly hostile to long established principles of constitutional law, (2) completely destructive of the concepts of individual liberty written into our Constitution, and (3) plainly subversive of the Government of the United States. Therefore it should be made plain that these are not the mere lapses or oratorical flourishes of a fervid brief writer. They are accurate samplings of a philosophy written deeply into every page of Appellants' Brief. The same propositions are restated and reargued, for example, as follows:

1. Freedom of Assembly includes right to make "indispensable" contracts. (Appellants' Brief pp. 30, 33, 34, 35, 37, 44, 62, 71, 81, 84, etc.)

2. Closed-shop contracts are "indispensable". (Appellants' Brief pp. 27, 30, 32, 37, 40, 62, 80, etc.)

3. Labor monopolies are "indispensable". (Appellants' Brief pp. 30, 39, 42, 43, 46, 56, 71, etc.)

4. All workers are compulsory members of a "society" which is governed by a union. (Appellants' Brief pp. 46, 47, 57, 58, 59, 71, 73, etc.)

5. The collective "right" of a union to govern is superior to the constitutional rights and liberties of an individual worker. (Appellants' Brief pp. 57, 59, 68, 71, 72, etc.)

Of course the mere statement of such an argument condemns it. But—even more important—the Brief for Appellants demonstrates conclusively, not only the constitutionality of the Right-to-Work Amendment, but also the urgent need for such legislation to prevent labor unions from carrying out their declared intention to "govern" the workers

and the economic life of America, under a specious claim of constitutional *collective* "rights". This claim of the superiority of private laws enacted by an organization of *some* of the people over public laws enacted by the constitutional organization of *all* the people is a negation of the fundamental doctrines of our constitutional, democratic form of government.

It is, therefore, well worth while to analyze carefully each of the five major contentions of appellants and to demonstrate the falsity of their alleged bases in fact and in law.

1. *Freedom to* ASSEMBLE *does not produce a* RIGHT *to make contracts which are* INDISPENSABLE *to accomplish the purposes of assembling.*

Freedom to assemble is *in fact* only freedom for individuals to gather together and to discuss (with free speech) their common desires and intentions and the ways and means to accomplish them. The freedom to take collective *action* depends on the legitimacy of the objects and the means of collective action. If the object or the means involve injury to others, or deprivations of lawfully protected rights of others, the making of contracts or the taking of any other action injurious to others may be forbidden, whether "indispensable" or not.

The *ultimate* object of an assembly may be entirely lawful—such as the object of trade unions to protect and to promote the welfare of the workers. But, if the *immediate* object is injurious to others—such as the object of depriving a community of the necessities of life—it would be insane to suggest that "freedom to assemble" *produces* a "right" to accomplish that immediate wrongful object. Equally irrational would be the contention that if an "assembly" decided that violence and bloodshed were "indispensable" *means* to accomplish its objects, then the right to assem-

ble would produce a "right" to shoot, stab and slug opponents into submission.

In the course of a notable dissenting opinion by Mr. Justice Brandeis, three outstanding liberal-minded Justices of the Supreme Court joined in a statement of law which was certainly not in conflict with the majority opinion because it was simply a summation of well established law.

> "Because I have come to the conclusion that both the common law of a State and a statute of the United States declare the right of industrial combatants to push their struggle to the limits of the justification of self-interest, I do not wish to be understood as attaching any constitutional or moral sanction to that right. All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat." (Dissenting Opinion of Justice Brandeis (with Justice Holmes and Clarke joining) in *Duplex Co.* v. *Deering*, 254 U. S. 443, 488.)

We can be sure that Appellants would contend that a right to strike was at least as "indispensable" to organized labor and as "absolute" as a right to make a closed-shop contract. So it is pertinent to call attention here also to the *unanimous* opinion of the Supreme Court delivered by Mr. Justice Brandeis in *Dorchy* v. *Kansas*, 278 U. S. 306, in which it is flatly stated, at page 311, that:

> "Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike."

It is, of course, the contention of Appellants that the "indispensable" means which they wish to employ is the making of contracts, which is a lawful, indeed a "fundamental" right. But, this argument begs the question, because no one has an *absolute right* to make any contract he pleases. The decisive question is: Will the proposed contract injure others, or violate rights of others, or be destructive of public health, safety and welfare? No "right" to make a particular contract can be founded simply on the right to assemble.

Appellants concede that the right of businessmen to assemble does not produce a right to make price fixing agreements (Appellants' Brief p. 75). Would Appellants contend that a group of small shopkeepers, who are certainly a group of "workers", could "assemble" as a union and agree to stop "cut-throat competition" by selling goods on a basis that would give them adequate compensation (fair wages) for their work? The contention of appellants is plainly that the right of one class of workers to assemble gives them "rights" of collective action which the right to assemble produces for no other class of citizens. But, the *fact* is, and the *law* is, that the Constitution confers equal civil rights on all citizens as *individuals*—no greater right on one class than on another. That is the fundamental doctrine of our Constitution. There is no basis in fact for the claim that the right of workers to assemble has ever been regarded as producing a right to make contracts which other citizens have no right to make. There is also no basis in law for the claim that freedom of assembly produces a right to make any contract that the legislative power determines to be inimical to the public health, safety or welfare. (See cases cited under Point 1 of Appellees Argument.)

2. Contracts to exclude non-union workers from employment are not in fact *"indispensable" to accomplish the legitimate purposes of a trade union.*

The history of trade unionism need not be reviewed to demonstrate that the exclusion of non-union employees from work has always been a major objective of most unions. The *value* of this means of advancing the wages and working conditions of members of unions need not be debated. But the fact that these means are not "indispensable" is also demonstrated by history.

Foremost in this demonstration is the history of the railway labor unions. They grew into one of the most powerful groups of labor organizations ever known, *while adhering to the policy of voluntary unionism.* They organized in many crafts almost every worker, *without any statutory protections of the right of organization.* Then they induced the Congress to enact the Railway Labor Act of 1926 and the subsequent amendments of 1934, and they helped to write into this statutory law a provision forbidding employer coercion *either to prevent* employees from joining a union *or to compel* employees to join a union.

There are many other labor organizations which do *not* seek or obtain contracts by which employers *compel* their employees to join a union. But the single notable example of the growth and power of the railway unions, and the discipline which they maintain, completely refutes the claim that it is "indispensable" to union success to obtain contracts by which employers will *compel* workers to join a union in order to obtain or to hold a job.

Furthermore, the history of unionism shows that the unions waged a long and successful struggle to prevent employers from exercising any power to coerce employees either *not to join* a union, or *to join* only a "collaborating" organization, commonly called a "company union". The

unions made this fight on the ground that the "freedom of labor" required a man to be free to join *or to refuse to join* any labor organization, according to his own, uncoerced judgment. The unions strongly urged and supported the enactment of the Norris-LaGuardia Act which provided explicitly, and declared as "the public policy of the United States", that a worker should have "full freedom of association" and also "should be free to decline to associate with his fellows" (29 U. S. C. A. 102).

Now we find the Appellant labor organization contending that it is "indispensable" to union progress to make contracts with employers under which a man will be denied employment *by the employer*, unless he consents to join the particular union which makes the contract. In a word, the appellant labor organizations are *now* contending that employers have a constitutional right to discriminate against a worker and against unions generally if *one* union requests discrimination in *its* favor.

There is no longer to be any "freedom of labor" which permits a worker to be "free to decline to associate with his fellow workers", although that is the officially declared "policy of the United States". There is no longer to be any "freedom of labor" for a worker to choose the union to which he wishes to belong. Every worker is to be *compelled* to join the union that happens to have a contract with his employer, because, it is now claimed that employer coercion through refusing to employ a non-union worker is the "indispensable" means of forming and maintaining a union (Appellants' Brief p. 32, et seq.).

The entire history of trade unionism and of legislation in aid of collective bargaining and of the freedom of labor to choose its own representatives, demonstrates that employer coercion through closed-shop contracts is neither the "indispensable" nor the desirable means of forming or

maintaining a union. Such contracts are, however, a very *useful* means of establishing and maintaining monopolies of the labor supply and thereby eliminating competition, not only between workers, but also between employers. Such monopolies are not a lawful objective of any organization; and contracts for the purpose of achieving such objectives can certainly be forbidden by law.

3. *Contracts to establish labor monopolies are not "indispensable" to labor unions.*

Appellants, of course, disavow in their complaint any purpose to monopolize the labor supply, or the existence of any such monopoly. But the complaint itself contradicts their own assertions (See Point 1 of this Brief); and their brief argues in clear language that a monopoly of the labor supply is "indispensable" to accomplish the purposes of a union. The disclaimers of the intent to monopolize or of the existence of monopolies, makes ridiculous the entire argument that monopolistic contracts are "indispensable" to union success. But, the extensive argument by which appellants attempt to show that workers "cannot thrive but can only die under competition between themselves", proves that the purpose of closed-shop contracts is eventually to end all such competition by establishing and maintaining universal monopolies of the labor supply.

Thus Appellants are led into the final desperate argument that a legally unrestrained monopoly of the labor supply is not only permissible, but is a constitutional right which is an "indispensable concomitant of the right of workers to assemble into labor organizations". This right to monopolize is not a concomitant of the right of business men to assemble, it is argued, because business men organize to make a "profit", whereas workers organize for "self-protection". (Appellants' Brief p. 75.) Apparently Ap-

pellants believe that when workers assemble for the purpose of increasing their earnings they have constitutional rights which are not available to businessmen who assemble for the purpose of increasing *their* earnings. This is the same theory of class rights which pervades Appellants' whole argument. The fact that the Constitution establishes *equal* rights for all "persons" and no special rights for any class of persons, is simply ignored. Special constitutional rights (not even for all persons gainfully employed, but only for *unionized workers*) are blandly asserted as though the Constitution had already been rewritten by a "dictatorship of the proletariat". Indeed it is claimed that workers, when voluntarily or compulsorily organized, constitute a "society" whose "government" has been made, to a large extent, constitutionally immune to regulation by the political governments established by all the people. This extraordinary claim next merits our attention.

4. *All workers are* not *involuntary "members of a society" which is "governed" by a union.*

The breath-taking argument of Appellants that "the worker becomes a member of an economic society" which a union has a constitutional right to "govern", is developed at great length in Appellants' Brief pp. 47-74. If this were merely a contention that those who *voluntarily* join a private organization must obey its private laws, there would still be needed the qualification that those private laws must be in conformity with public laws. But, Appellants contend, *first*, that this is an "economic society" of which anyone who "takes employment" becomes a member, willy-nilly, just as a person born in a country becomes a citizen; *second*, that obedience to the "laws" of the society is *compulsory* upon individuals; *third*, that the government of this society is vested in the particular union which has collective bargaining rights or powers over his employment; *fourth*,

that the constitutional liberties of American citizens "must be sacrificed for the welfare of this society", that is, must be limited to the extent required by the union which "governs" this "society".

Thus emerges the design of a new form of government. If there were "one big union" it would then govern the entire economic life, and inevitably the political and social life of the nation. But, since there are a great many unions which are autonomous, the governing power of our "economic society" is to be divided among a large number of unions, with overlapping "jurisdictions", which unions will subject the country to the conflicting laws of several quarreling governments. Presumably, however, these unions will all agree that compulsory membership in at least one of their "societies" is an "indispensable" condition of employment, to be enforced (on penalty of starvation), regardless of any individual rights supposedly guaranteed by the emasculated Constitution of the United States.

The doctrine of Appellants is so fantastic that it would not be seriously discussed were it not for the fact that there is a similar doctrine which has gained wide acceptance in other parts of the world. But, let it be said quickly, Appellants are not claiming a right to establish a *communistic* dictatorship of the proletariat as a constitutional exercise of the freedom of assembly. The *communist* program provides for the creation of *one* central government of an economic (and political) society, which government will rule by *public* laws enacted presumably in conformity with a *public* constitution. Such a government could not be established under our present national Constitution.

Appellants, on the contrary, argue that a large number of private organizations have a *right*, under the existing Constitution of the United States, to enact and enforce *private* laws to govern all workers and a right to require

all workers either to submit to those laws or to be denied employment. Appellants assert that a labor union has "the powers and responsibilities of a government" (Appellants' Brief p. 57). The fact is that these unions want to have the "powers" of a government conceded to them; but they are subject to no "responsibilities" comparable to those imposed on *public* governments by constitutions which are written by and for the people to be governed, and which commonly *limit definitely the powers* and *fix definitely the responsibilities* of the government to be established.

To establish the right of private government which is claimed by Appellants would be to destroy the Constitution of the United States, and to end its promise of individual liberty and freedom from every form of private tyranny, that has made American citizenship the greatest heritage that has ever blessed any people. It is unthinkable that such an argument should obtain any sanction from judges sworn to protect and defend the Constitution. It is shameful to think that such an argument can be addressed to the Supreme Court of the United States.

5. It seems needless to argue further that the liberties of the individual worker, which are guaranteed under the Constitution—that his freedom of association, his liberty of contract and his right to work free from servitude to any person or organization—are *not* inferior to, and subject to, any collective "right" of a labor union to govern him against his will. That cannot be the law so long as the Constitution of the United States remains the supreme law of the land.

The Demand for Statutory "Security"

There is one argument in Appellants' Brief which is not irrational, although it advocates a rule of law which cannot be established without abdication of essential powers of

government. Appellants contend that, even if legislation to nullify closed-shop contracts can be constitutionally enacted, such enactments must be accompanied by laws such as the Railway Labor Act or the Wagner Act which provide a statutory "security" for unions in substitution for the "security" they obtain through "union security" contracts.

This is a plausible argument to address to a legislature, but an improper one to present to a court. By that same argument the Wagner Act would have been held unconstitutional because it failed to give employers statutory protections against abuses of union power, when the statute denied employers those powers of self-protection previously available through an unrestricted use of their "fundamental right" to hire and to discharge workers in accordance with their personal preferences.

But, this objection to the validity of the Wagner Act was disposed of by the Supreme Court in the following language:

> "The Act has been criticised as one-sided in its application; that it subjects the employer to supervision and restraint and leaves untouched the abuses for which employees may be responsible; that it fails to provide a more comprehensive plan,—with better assurances of fairness to both sides and with increased chances of success in bringing about, if not compelling, equitable solutions of industrial disputes affecting interstate commerce. But we are dealing with the power of Congress, not with a particular policy, or with the extent to which policy should go. We have frequently said that the legislative authority, exerted within its proper field, need not embrace all the evils within its reach. The Constitution does not forbid "cautious advance, step by step," in dealing with the evils which are exhibited in activities within the range of legislative power. (Many citations) The question in such cases is whether the legislature, in what it does pre-

scribe, has gone beyond constitutional limits." *N.L.R.B. v. Jones & Laughlin S. Corp.* 301 U. S. 1, 46.

Appellants' argument that the Arizona law should be held unconstitutional because in Arizona there is no "statutory protection for union organization or common rules of employment". (Appellants' Brief p. 61) is not only bad in law, but involves a misrepresentation of fact. Arizona has a typical anti-yellow dog contract law which prevents discrimination against workers because they are members of trade unions, thus providing statutory protection for *union* workers, whereas the Right-to-Work Amendment provides an equivalent statutory protection for *non-union* workers. (Sections 56-120 and 43-1608 A. C. 1939)

Conclusion—Constitutional Rights of the Individual Worker

It can hardly be contended that labor unions (which are, in the main, unincorporated associations) have constitutional rights separate from and in conflict with the rights of the individual worker. The contention of appellants must be that individual workers have a right to combine for the purpose of obtaining contracts from employers which will exclude from employment all workers who do not join in the combination.

To state thus candidly the contention of appellants is to demonstrate its fundamental weakness. The most vital, elementary right of every person under the Constitution is certainly a right to work—that is, not a right to compel anyone to employ him, but freedom to seek and obtain lawful employment from any employer who is willing to employ him.

"The liberty mentioned in that Amendment (Fourteenth) means not only the right of the citizen to be free from the mere physical restraint of his person, as by in-

carceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

Allgeyer v. *Louisiana*, 165 U. S. 578.

In the light of this statement of constitutional rights the liberty of a worker to join a union must include an equal liberty not to be compelled to join a union.

No one will contend that the State under our Constitution could make it a condition of obtaining employment that a worker must join a private organization, must pay whatever dues are charged, must submit to the discipline of its private laws, must decline to work with anyone not a fellow member, and must leave his employment whenever the organization or its officers decide that he should do so. But, if the State permits the making of contracts whereby all the ordinary opportunities of employment are dependent upon joining a labor union and obeying its private laws, *is not the state, by validating such closed shop contracts, actually violating the Fourteenth Amendment?*

The answer according to the recent unanimous decision of the Supreme Court in *Shelley* v. *Kraemar*, 92 L. Ed. Adv. Opinion 845, appears to be that the government cannot enforce such contracts. In the foregoing "restrictive covenant" case this Court held that an anti-racial covenant was lawful, but unenforceable, because enforcement would violate a civil right guaranteed by the Constitution. It follows inevitably from this ruling that the State could constitutionally enact a law making it unlawful to make

a restrictive covenant which the State cannot constitutionally enforce.

By the same reasoning does it not follow that, since the government could not legally force every worker to join a union, it cannot enforce contracts which have that conceded purpose? Whereupon, it also follows that a law forbidding the making of such a contract, not only does not violate the Constitution but, on the contrary, carries into effect a mandate of the Constitution.

In final analysis it is plain that the liberty of a worker to join a labor union must include the liberty not to join a union; and any public law, or any private law created and enforced by contract, which denies to any person that liberty is violative of a constitutional right which can be and should be protected by law.

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